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Robert J. Beles Bar No. 41993
 David Reagan Bar No. 275192
 One Kaiser Plaza, Suite 2300
 Oakland, California 94612-3642
 Tel No. (510) 836-0100
 Fax. No. (510) 832-3690

Attorneys for *Defendant*
 ALEX EYE BURSCH

United States District Court
 Northern District of California
 Oakland Courthouse

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALEX EYE BURSCH,

Defendant.

No. **4:11-CR-00644-PJH**

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
 MOTION TO SUPPRESS EVIDENCE

(F.R.Cr. P. 12(b)(3)(C) and 41(h))

Date: Wednesday, March 28, 2012

Time: 2:30 pm

Courtroom: 3 - Hon. Phyllis J. Hamilton, Judge

Speedy Trial Act Excludable Time: 18 U.S.C. 3161(h)(1)(F)

SUPPLEMENTAL MEMORANDUM IN SUPPORT
 OF MOTION TO SUPPRESS EVIDENCE

Upon reviewing the warrant and affidavit further, the defense has noticed two additional problems with the affidavit.

1. Detective Shabazz signed a search warrant affidavit actually prepared by Detective Mathers, who did not sign the affidavit.

Page 1 of the search warrant affidavit (Exhibit "A" to counsel's declaration) states that "Detective David Mathers and Detective Xavier Shabazz, being duly sworn, deposes and says that there is probable cause to believe" that certain evidence of a crime will be found at 5016 Wagon Wheel Way, Antioch, California. However, only *one individual* actually signed the affidavit. In comparing the signature on the affidavit with the signature on the return to the warrant, (Exhibit "B" to counsel's declaration), it is clear that it was Detective Shabazz who

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1 signed the affidavit. In the additional facts attached to the warrant affidavit, Detective Shabazz
2 indicates that an earlier warrant was issued by Judge Arnason but Shabazz was unable to serve
3 it within ten days of its issuance, so he is requesting that the warrant be reissued. Thus, it appears
4 clear that it was Shabazz who presented the warrant application and affidavit to the magistrate
5 who issued the warrant, Judge Laittner.

6 However, the narrative statement of probable cause was prepared by Detective Mathers
7 and not Detective Shabazz. Detective Mathers states that he is the affiant and refers to
8 “additional attached expertise and statements” of Detective Shabazz, suggesting that the only
9 things Shabazz prepared was these attached documents. The narrative statement of probable
10 cause and opinion states at the bottom of each page that it is of Detective Mathers. No part of
11 the narrative statement of probable cause indicates that any portion of the information was
12 supplied by Detective Shabazz.

13 In the initial memorandum, defendant stated that Detective Shabazz signed the affidavit
14 and discussed the affidavit as if it was Shabazz’s affidavit. However, upon closer examination
15 of the affidavit, it appears that Shabazz has sworn to someone else’s narrative statement of
16 probable cause. The person who actually prepared the narrative statement of probable cause,
17 Mathers, *did not sign the affidavit and thus did not swear to it under oath.*

18 California Penal Code section 1525 provides:

19 “A search warrant cannot be issued but upon probable cause, supported by
20 affidavit, naming or describing the person to be searched or searched for, and
21 particularly describing the property, thing, or things and the place to be
22 searched.”

23 Section 1525, of course, paraphrases the Fourth Amendment itself, which provides:

24 “. . . no Warrants shall issue, but upon probable cause, supported by Oath or
25 affirmation, and particularly describing the place to be searched, and the persons
26 or things to be seized.”

27 Thus, the requirement that a warrant be supported by probable cause, supported by oath
28 or affirmation, is part of federal constitutional law itself. As the Supreme Court held in *United States v. Nathanson*, 290 U.S. 41, 47, 54 S. Ct. 11, 78 L. Ed. 159 (1933) probable cause to support issuance of a warrant must be based on “facts or circumstances presented to [the

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1 magistrate] under oath or affirmation. Mere affirmance of belief or suspicion is not enough.”

2 California Penal Code section 1526(a) requires the magistrate, before issuing the warrant,
3 to either “examine on oath the person seeking the warrant” or to “take his or her affidavit or
4 their affidavits in writing, and cause the affidavit or affidavits to be subscribed by the party or
5 parties making them.” California Penal Code section 1526(b)(2)(B) requires the magistrate to
6 “verify that . . . the affiant's signature, digital signature, or electronic signature is acknowledged
7 as genuine.” California Penal Code section 1527 provides that the affidavit in support of the
8 search warrant “must set forth the facts tending to establish the grounds of the application, or
9 probable cause for believing that they exist.”

10 Code of Civil Procedure section 516.030 provides that an “affidavit shall show
11 affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated
12 therein.” Evidence Code section 702(a) makes a statement of any witness inadmissible “unless
13 he has personal knowledge of the matter.”

14 Detective Shabazz could not sign an affidavit under oath that was actually prepared by
15 Detective Mathers based on Mathers’ own investigation. The narrative statement of probable
16 cause was clearly prepared by Mathers, not Shabazz. The magistrate could not have sworn
17 Detective Mathers as a witness since Mathers did not sign the affidavit and apparently was not
18 present to do so. Nor could the magistrate issue a search warrant based on an unsigned and thus
19 unsubscribed “affidavit”, as Penal Code section 1526(a) requires the magistrate to “cause the
20 affidavit or affidavits to be subscribed by the party or parties making them.” The magistrate
21 could not allow Shabazz to sign Detective Mathers’ affidavit, as Shabazz’s signature would not
22 be a “genuine” signature of Mathers under Penal Code section 1526(b)(2)(B) and would not be
23 a substitute for testimony that Shabazz could competently give, as required by Code of Civil
24 Procedure section 516.030. As Penal Code sections 1525 and 1526(a) forbid a magistrate to
25 issue a search warrant unless the warrant is supported by an affidavit or affidavits setting forth
26 probable cause, the search warrant here was unlawfully issued. It was not supported by a lawful
27 affidavit, since the person who signed the affidavit was someone other than the affiant. As *United*
28 *States v. Nathanson*, 290 U.S. at 47 required, the probable cause must be based on “oath or

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1 affirmation”, which Shabazz could not have provided of Mathers’ affidavit, not “mere
2 affirmance of belief.”

3 **2. The affidavit did not provide any probable cause to believe that**
4 **any evidence of a crime would be found at the place sought to be searched.**

5 The search warrant seeks authorization to search a house located at “**5016 Wagon Wheel**
6 **Way, Antioch, CA.** The cover page of the search warrant affidavit also lists the premises to be
7 searched as “**5016 Wagon Wheel Way, Antioch, CA.**” However, Mathers’ “narrative statement
8 of probable cause” provides only information relating to “**5018 Wagon Wheel Way, Antioch,**
9 **CA.**” (emphasis added.)

10 On page 1 of the narrative statement of probable cause, the affiant, Detective Mathers
11 describes how another detective, Ichige, downloaded what Ichige believed was child
12 pornography from defendant’s computer over the internet. On page 2, Mathers states that Ichige
13 obtained customer records from defendant’s internet provider that indicated that defendant’s
14 address was “**5018 Wagon Wheel Way, Antioch, CA 94509.**” (emphasis added) Shabazz also
15 states that he reviewed DMV and police records listing “this location” (i.e., 5018 Wagon Wheel
16 Way) as defendant’s residence. Mathers also states that he “checked with another public records
17 database” and found that the records were “consistent with the law enforcement and
18 Department of Motor Vehicle’s records.” Mathers then states:

19 “It is my opinion that BURSCH lives at **5018 Wagon Wheel Way, Antioch.** He
20 provided that address to numerous government sources. He lists it on his
21 documentation, and he uses it for internet services.” (emphasis added.)

22 Thus, all of the purported probable cause supporting the warrant indicates that defendant
23 resided at **5018 Wagon Wheel Way.** There is no information in the narrative statement of
24 probable cause showing how Mathers determined that the address to be searched was actually
25 **5016 Wagon Wheel Way.** Defendant in fact resided at all times at 5016 Wagon Wheel Way,
26 Antioch, CA **94531.**¹ This is the place that was actually searched, and the place where the
27 evidence defendant seeks to suppress was found.

28 “[T]he role of the magistrate is to determine whether, ‘given all the circumstances set

¹ The zip code of “94509” provided in the narrative statement of probable cause was also incorrect.

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1 forth in the affidavit before [her] . . . there is a fair probability that contraband or evidence of
 2 a crime will be found in a particular place.” *Greenstreet v. County of San Bernardino*, 41 F.3d
 3 1306, 1309 (9th Cir. 1994), quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76
 4 L. Ed. 2d 527 (1983). “The facts presented ‘must be sufficient to justify a conclusion that the
 5 property which is the object of the search is probably on the premises to be searched at the time
 6 the warrant is issued.’” *Greenstreet, id.*, quoting *United States v. Greany*, 929 F.2d 523, 524-25
 7 (9th Cir. 1991.) “Probable cause to arrest concerns the guilt of the arrestee, whereas probable
 8 cause to search an item concerns the connection of the items sought with the crime and the
 9 present location of the items.” *Millender v. County of Los Angeles*, 620 F.3d 1016, 1029 n.6 (9th
 10 Cir. 2010) (en banc).

11 Mathers included no information in the narrative statement of probable cause indicating
 12 that any evidence of child pornography would be found at the address to be searched, 5016
 13 Wagon Wheel Way. While the warrant affidavit contained “bare-bones” conclusory information
 14 that defendant might be in possession of child pornography, it provided absolutely no
 15 information associating defendant with 5016 Wagon Wheel Way, Antioch, California. *Millender*
 16 *v. County of Los Angeles*, 620 F.3d at 1029 n.6.

17 As the warrant contained absolutely no information that any child pornography would
 18 be found at 5016 Wagon Wheel Way, this warrant cannot be saved under the good faith rule.
 19 *Greenstreet v. County of San Bernardino*, 41 F.3d at 1310, citing *Malley v. Briggs*, 475 U.S. 335,
 20 345, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).

21 3. Conclusion

22 As pointed out in the initial memorandum, Mathers’ narrative statement of probable
 23 cause did not in fact contain any probable cause to believe that any child pornography was
 24 located on defendant’s computer. All it presented was a conclusion that detective Ichige had
 25 downloaded child pornography from defendant’s computer. This bare bones statement did not
 26 meet the requirements of probable cause.

27 It now appears that Detective Mathers listed the wrong address in the statement of
 28 probable cause and did not provide any information indicating that any evidence of a crime

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1 would be found at defendant's actual address.

2 And as a final blow, Mathers didn't even sign his affidavit. Instead, Mathers' affidavit was
3 signed by another detective, Shabazz.

4 Under the circumstances, this court should quash the warrant and suppress the evidence
5 seized from defendant's residence.

6 Dated: Oakland, California, Wednesday, February 15, 2012.

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10 **Robert J. Beles**
11 Attorney for *Defendant ALEX EYE BURCH*
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